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In The Supreme Court of the United States

OCTOBER TERM, 1978

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 49a-50a)[1] is not reported. The opinion of the district court (Pet. App. 51a-58a) is reported at 442 F. Supp. 383.

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[1] "Pet. App." refers to the separately bound appendix to the petition in No. 78-1088.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a–49a) was entered on November 7, 1978. The petition for a writ of certiorari in No. 78–1088 was filed on January 8, 1979, and the petition in No. 78–1217 was filed on February 5, 1979. The petitions were granted and the cases consolidated on April 16, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an agency "withholds" agency records in violation of the Freedom of Information Act, 5 U.S.C. 552, if it does not have custody of the records when a request for them is made and does not acquire or retrieve them in order to respond to the request.

2. Whether informal notes summarizing petitioner Kissinger's telephone conversations as Secretary of State—notes not in the Department of State's control—are "agency records" of the Department within the meaning of the Freedom of Information Act, 5 U.S.C. 552.

3. Whether informal notes summarizing Kissinger's telephone conversations as Assistant to the President for National Security Affairs became "agency records" of the Department of State when Kissinger took them with him on becoming Secretary of State.

4. Whether review of the notes for possible disclosure would violate Kissinger's constitutional expectation of privacy.

STATUTES INVOLVED

5 U.S.C. 552 provides in part:

> (a)(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * * *
>
> (a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

44 U.S.C. 3101 provides:

> The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. 3102 provides:

> The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for
>
> (1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;
>
> (2) cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and
>
> (3) compliance with sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them.

44 U.S.C. 3106 provides:

> The head of each Federal agency shall notify the Administrator of General Services of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Administrator shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.

44 U.S.C. 3301 provides:

> As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

STATEMENT

A. The Notes

From January 20, 1969, until September 22, 1973, petitioner Henry A. Kissinger served as Assistant to the President for National Security Affairs (A. 244a). From September 22, 1973, until November 3, 1975, he served both as Assistant to the President for National Security Affairs and as Secretary of State (*ibid.*). From

November 4, 1975, until January 20, 1977, he served as Secretary of State (*ibid.*). During Kissinger's period of government service, his secretaries generally monitored his telephone conversations and took shorthand notes of what was said; they prepared summaries which, in some cases, were substantially verbatim transcripts (*ibid.*)[2] Conversations so monitored covered official business, private matters, and shades of each (A. 245a).[3]

Kissinger had no regular practice of editing the notes for accuracy (*ibid.*).[4] They were used by his executive

[2] In some cases the conversations were taped and the summaries made later from the tapes (A. 153a). In no cases were the original stenographic notes, or any tapes, retained after the transcription (A. 153a, 244a). For convenience we refer to the summaries, which were retained, as "notes."

[3] The record includes no example of the notes other than the following excerpts from summaries in 1969 concerning "leaks" (A. 148a–149a):

Date	*Partial Transcription*
February 3, 1969	"K and [A] discussed press leaks."
February 19, 1969	"K said this was probably unnecessary call but President is very anxious that there be no leaks of any sort about trend of the discussion today. [B] said he would say nothing."
March 18, 1969	"HAK said the President's first concern was if the things we are trying to do leaked, it would lose its effectiveness."

[4] There is a factual dispute concerning whether Kissinger edited at least *some* of the notes for accuracy. Plaintiff William A. Safire contends that Kissinger did edit at least some of the notes (A. 175a). Kissinger, however, states that he "did not edit them as they were prepared or at any other time" (A. 191a–192a). Kissinger's statement that he had no *regular* practice of editing the notes for accuracy seems undisputed.

secretary to prepare his appointments schedule and were read by his immediate staff to keep abreast of Kissinger's activities and to follow up on matters discussed. This avoided the need for Kissinger to repeat to aides and staff the substance of his many phone conversations (A. 245a). The notes were not circulated beyond his immediate personal staff (A. 246a). They were filed in Kissinger's office in personal rather than official files (A. 245a).

B. The Deeds

1. On November 12, 1976, petitioner Kissinger deeded to the United States, in care of the Library of Congress, a large collection of papers relating to his career (A. 42a–45a). This collection did not include the telephone notes, but it included both personal materials collected during Kissinger's years at Harvard University and the contents of personal files he had accumulated in government. Employees of the Department of State reviewed the copies of official documents contained in this collection and retained (a) original or record copies of documents belonging to the agency, and (b) any materials containing classified information (A. 251a–253a).

By a second deed dated December 24, 1976, Kissinger transferred to the United States ownership of the telephone notes, subject to certain restrictions on access (A. 45a–46a).[5] On December 28, 1976, the notes

[5] Public access will be permitted 25 years after the transfer or five years after Kissinger's death, whichever is later, unless one of the parties to the conversation is still living, in which case the summary shall become available only with that party's consent (A. 45a–46a). In the interim, Kissinger (and anyone who receives his approval) may review the materials (*ibid.*).

were delivered to the Library of Congress (A. 249a).[6] The deeds and the documents were accepted by Daniel J. Boorstin, Librarian of Congress (A. 45a, 46a).

2. On at least two occasions in 1976, Monroe Leigh, the Legal Adviser of the Department of State, advised Kissinger that the telephone summaries were not agency records but were his personal materials which he would be free to take when he left office (A. 80a, 258a-259a). The Legal Adviser based this conclusion on, among other things, the fact that Kissinger consistently had filed the materials in his personal files, had not circulated the summaries beyond his personal staff, and had not been required by statute or departmental regulations to create the summaries. The Legal Adviser also concluded that the Department's record-keeping needs could be met by the preparation of extracts of the information contained in the notes that pertained to official business (A. 81a-84a). After the transfer of the notes to the Library of Congress, Kissinger authorized a State Department official to review them and to prepare such extracts (A. 248a). The extracts, once made, were filed with the State Department and the National Security Council (A. 248a).

C. The FOIA Requests

On January 12, 1976, several months before the gifts were made, Kissinger filed answers to interrogatories

[6] Kissinger removed all of the existing notes from his office to a vault in New York on October 29, 1976 (A. 248a). Kissinger states that his secretaries "generally monitored" telephone calls "during the period of his government service," which ended on January 20, 1977 (A. 244a). Therefore, the record suggests that after the removal of existing notes to the vault on October 29, 1976, Kissinger's secretaries continued to make notes. All summaries in existence were delivered to the Library of Congress on December 28, 1976 (A. 248a-249a).

in a suit involving alleged wiretapping of federal employees and journalists, who had been suspected of disclosing confidential information (A. 148a). In response to interrogatories requesting identification of records of telephone conversations made during a period before Kissinger became Secretary of State, he described the monitoring and note-making procedure we have recounted (A. 149a).[7]

On January 14, 1976, William Safire, a columnist employed by the *New York Times*, requested the Department of State to produce, under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, any transcripts referred to in the interrogatory answer concerning (a) any conversation in which Safire's name appeared or (b) any conversation with designated persons in which the subjects of "leaks" of information was discussed (A. 49a-51a). By letter of February 11, 1976, the Department of State denied the request on the ground, among others, that the notes had been made while Kissinger was National Security Adviser and therefore were not agency records (A. 168a-170a). By letter of February 24, 1976, Safire appealed this decision to the Assistant Secretary of State for Public Affairs (A. 52a-55a). Safire acknowledged that the notes had been made at the White House, but he insisted that they were State Department records by virtue of their relocation to the State Department (A. 52a-53a). The appeal was denied by letter of March 29, 1976, stating, among other things, that "documents which are originated in a White House office by a member of the

[7] The period referred to in the interrogatory and answer was January 21, 1969, through February 12, 1971 (A. 149a). Kissinger did not become Secretary of State until September 22, 1973 (A. 244a).

President's immediate staff * * * are not subject to the Act" (A. 171a–173a). No further action was taken by Safire until almost a year later, when he and others filed one of the two suits involved in this case.

On November 11, 1976, the *Washington Post* printed an interview with Lawrence Eagleburger, Deputy Undersecretary of State, in which Eagleburger reportedly stated that Kissinger might take "secretarial notes of his telephone conversations" with him when he left his post (A. 86a). Eagleburger, it was reported, also stated that the Legal Adviser had told Kissinger that the notes were personal papers rather than agency records (*ibid.*).

On December 28, 1976, Kissinger released an announcement of his gift of the notes to the United States and their placement in the Library of Congress (A. 167a). On the same day, the Military Audit Project, and its director (referred to collectively as "MAP") filed an FOIA request with the Department of State, seeking all records of conversations between Kissinger as Secretary of State, and foreign heads of state, ambassadors, foreign ministers and national security advisers (A. 17a–18a, 69–70a). On December 29 MAP made a second FOIA request, this time seeking conversations of the Secretary of State with anyone (A. 17a, 71a–72a). MAP did not request telephone notes made while Kissinger was National Security Adviser. On January 18, 1977, the Legal Adviser of the Department of State denied the requests because the notes were not agency records and, in any event, had been deposited with the Library of Congress prior to the requests and thus no longer were within the custody or control of the Department of State (A. 73a). The denial was affirmed on administrative appeal (A. 78a–79a).

On January 13, 1977, the Reporters Committee for Freedom of the Press (RCFP), the American Historical Association, the American Political Science Association, and a number of other journalists (collectively referred to as "the RCFP requesters") submitted an FOIA request to the Department of State seeking "all transcribed secretarial notes of telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State" (A. 56a–59a).[8] On January 28, 1977, the request was denied on the grounds that the materials sought were not agency records and, in any event, were no longer in the Department's custody and control (A. 61a–63a).[9] The Department advised the RCFP requesters that they need not pursue an administrative appeal inasmuch as the materials sought were not agency records (A. 63a).

D. The Archivist's Request Under The Records Disposal Act of 1943 and the Federal Records Act of 1950

The Records Disposal Act of 1943, 44 U.S.C. 3301–3324, prohibits alienation or disposal of "records" with-

[8]The request also sought "all other * * * materials that reflect, verbatim or substantially verbatim, the contents of the conversations, telephonic or otherwise, held by Henry Kissinger" (A. 56a–57a). This portion of the request, insofar as it sought materials other than the secretarial notes, was denied by the Department on the ground that it was too broad and did not describe with reasonable particularity the documents requested (A. 62a). See 5 U.S.C. 552(a)(3). Later, however, the State Department withdrew its objection and processed this part of the request (see MAP Br. in Opp. 2 n.1).

[9]The Department's denial observed that the extracts based on the notes were agency records but that the agency understood the request to comprehend only the original notes, not the extracts (A. 62a).

out the approval of the Administrator of General Services. 44 U.S.C. 3303–3304. The Administrator's authority under this and related records-management provisions has been delegated to the Archivist of the United States. See GSA, Delegations of Authority Manual ADM P 5450.39A.

On January 4, 1977, the Archivist, James B. Rhoads, wrote to Kissinger, requesting that he be permitted to inspect the secretarial notes so that he could determine whether they were personal property rather than agency records and whether they were materials described by Section 101(b) of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note (A. 47a–48a). The Legal Adviser analyzed the request and issued a detailed memorandum dated January 14, 1977, which concluded that, under the Federal Records Act of 1950, 44 U.S.C. 2901–2909, 3101–3107, each agency has the responsibility to create and maintain records that effectively record essential agency actions, but that agencies enjoy reasonable discretion in determining precisely how this responsibility should be discharged. The Department's regulations did not require retention of the notes as agency records, the Legal Adviser concluded, so long as extracts of the official business contained discussed in the notes were filed as agency records (A. 92a–98a). He also concluded that the inspection procedure suggested by the Archivist would compromise the Department's policy of respecting the privacy of such secretarial notes and would discourage the creation of such historical materials in the first place (A. 96–97).

On January 18, 1977, Kissinger himself replied to the Archivist (A. 88a). Kissinger stated that there had been some misunderstanding about the nature of the gift and

enclosed a copy of the second deed. With respect to the request to inspect, the letter enclosed and referred the Archivist to the Legal Adviser's memorandum, "which discuss[ed] several problem areas that might arise if the additional procedures contemplated in your letter were followed" (A. 88a).

On February 11, 1977, the Archivist renewed his request for an inspection and enclosed a law memorandum of the General Counsel of GSA concluding that the materials in question might well be records rather than personal files and that the Archivist was entitled to inspect them (A. 99a–100a). Eventually, a limited inspection was conducted by the Archivist's staff (see J.A. 274–279), but no definitive resolution of the issue among Kissinger, the Department of State, and the Archivist was reached by the time the district court issued its decision.[10]

E. The District Court's Decision

On February 8, 1977, the RCFP requesters and Safire commenced an action in the United States District Court for the District of Columbia. They asked the court to compel disclosure of the notes Kissinger made as National Security Adviser and as Secretary of State (A. 1a, 22a–41a). On March 8, 1977, MAP filed a similar suit limited to the latter notes (A. 17a–20a). Both suits named Kissinger, the Librarian of Congress, the Secretary of State and the Department of State as defendants. The Archivist was named as a defendant in the second suit (A. 17a–18a). Plaintiffs sought a judgment declaring that the summaries are agency records of the Department of State, not personal papers, an order re-

[10] "J.A." refers to the joint appendix in the court of appeals.

quiring the Library of Congress to return them to the Department, and an order requiring disclosure to plaintiffs of all of the summaries save those exempt under the FOIA (A. 20a, 40a–41a). The cases were consolidated on June 20, 1977 (A. 3).

Plaintiffs moved for summary judgment, and Kissinger cross-moved for summary judgment (A. 64a–68a, 193a–198a).[11] The court granted plaintiffs' request in substantial measure. It first held that the State Department's rules required Kissinger to create the notes (Pet. App. 56a). Regulations required State Department employees to prepare adequate records of, among other things, all "[d]ecisions, commitments, and discussions of any significance which are oral in nature" in order "to provide materials for research and historical purposes." 5 Foreign Affairs Manual [FAM] 423.1–423.2. All conversations of the Secretary of State, the court said, are "significant" within the meaning of these regulations.

The court also concluded that the notes fit the definition of a "record" under the Records Disposal Act and

[11] The federal parties initially opposed the summary-judgment motion filed by plaintiffs on the ground that, after the suit had been filed, no representatives of any of the federal defendants had been permitted to review the notes, and that they therefore were unable to determine whether any federal defendants would seek custody of the materials (J.A. 190–198). Such an inspection was necesssary, it was urged, to determine whether any of the federal defendants would file a cross claim under Fed. R. Civ. P. 13 for return for the materials (J.A. 198). The federal parties simultaneously filed a request for production of the documents, under a protective order to preserve confidentiality, pursuant to Rules 26 and 34. An agreement was eventually reached between the federal defendants and Kissinger under which an inspection of the notes was permitted. The federal defendants then withdrew their opposition to the consideration of the pending summary-judgment motions (J.A. 274–279).

the Federal Records Act because they are "documentary materials * * * made or received by an agency * * * under Federal law or in connection with the transaction of public business and preserved or *appropriate for preservation as evidence of the* organization, functions, *policies*, *decisions*, procedures, operations, or other activities of the *Government* or because of the informational value of data in them" (Pet. App. 54a, citing 44 U.S.C. 2901(1), 3301; emphasis by the court). Invoking principles of property and copyright law, the court reasoned that the summaries are the property of the United States because they were prepared on government time and with the aid of department employees, equipment, materials and other public resources, and as part of Kissinger's official duties. Under these circumstances, the court held, the notes are "agency records," not personal property.

Second, the court held that agency records may be destroyed or alienated only with the prior approval of the Administrator of General Services. One remedy for a breach of this procedure, the court noted, is for the agency, through the Attorney General, to initiate an action for recovery of the missing records (Pet. App. 54a–55a). Although Kissinger argued that there is no private remedy for any violation of the records acts, the court did not consider this argument. It held, instead, that it could use "the broad equitable powers granted the district courts [by 5 U.S.C. 552(a) (4)(B)] in aid of their role as the 'enforcement arm' of the Freedom of Information Act * * * to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely" (Pet. App. 55a). Although the court never held that a retrieval action should have been brought, it ordered that the documents be re-

turned to the Department of State, and it ordered the Department of State to determine which of the summaries are exempt from disclosure under the FOIA and to advise Kissinger of its determination. The court invited Kissinger to move the court for a protective order prohibiting disclosure of any materials exempt under 5 U.S.C. 552(b)(6).[12] Subject to this procedure the State Department was ordered to make the required summaries available to plaintiffs.[13]

F. The Court of Appeals' Decision

All of the private parties appealed.[14] With respect to Kissinger's objections to the judgment, the court of appeals endorsed the district court's opinion without discussion (Pet. App. 49a).[15]. With respect to the summaries made during Kissinger's tenure as National Security Adviser, the court of appeals held that their production was not required by the FOIA. It reasoned: First, FOIA applies to "agencies," and, although the "Executive Office of the President" is an "agency" (see 5 U.S.C. 552(e)), the President's National Security Adviser is not. Second, the relocation of these notes to the State Department without use by that agency did not render them agency records of the State Department. Third, even if the notes concerned the National Security Council, which is an "agency" under the FOIA, no request was made to the National Security Council (Pet. App. 49a–50a).

[12] If the court is right in holding that the notes must be processed for release under the FOIA, it is clearly wrong in holding that the agency may be forbidden to disclose documents that it desires to disclose. See *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 6–10. No party has presented this question, however, for resolution by the Court.

[13] The court observed that plaintiffs had withdrawn their request for summaries made during Kissinger's tenure as National Security Adviser (Pet. App. 55a). Actually, however, no such withdrawal was made. At oral argument before the district court on September 28, 1977, counsel for MAP stated that his clients sought only the notes made while Kissinger was Secretary of State (A. 266a). But MAP had never requested the notes made while Kissinger was National Security Adviser. The RCFP requesters had made such a request and did not surrender it at the hearing. The court evidently mistakenly believed that MAP had requested the earlier notes and then withdrew the request. The court of appeals considered the issue on the merits.

[14] The four federal defendants—the Secretary of State, the Department of State, the Librarian of Congress, and the Archivist of the United States—did not appeal. They appeared in the court of appeals as appellees but did not file a brief. Instead, the United States filed a brief as amicus curiae, arguing that the district court erred in ordering the return of the documents in what amounted to a private action to enforce the Federal Records Act, without finding that they had been removed in anticipation of, or to defeat, an action under the FOIA.

The four federal defendants appear in this Court as respondents under this Court's Rule 21(4). Although the federal parties did not participate actively in the court of appeals in their own names, that is not a bar to their urging here that the court of appeals' judgment should be reversed in part. The Court has jurisdiction to adjudicate the full case and to answer the questions presented in the petitions. Whether it receives the views of the federal parties on these questions as parties or as amici curiae is of little consequence.

[15] The court of appeals refused to stay the district court's order pending appeal. On April 24, 1978, this Court stayed the order pending final disposition of the appeals. 435 U.S. 993. Although the court of appeals' order affirming the judgment has not been stayed, retrieval and processing have been postponed pending this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The disputed telephone notes are in the possession of the Library of Congress. They are the property of the

United States, Kissinger having surrendered whatever interest he had. The Library of Congress desires to keep the notes; the State Department, so far as this record discloses, does not want them back. The Freedom of Information Act does not require a court to order the notes transferred from an institution that wants them to an institution that does not.

The Act requires "agencies" to make nonexempt "records" available on request. 5 U.S.C. 552(a)(3). The Act authorizes the district courts to enjoin an "agency" from "withholding agency records" and to order the production of any "agency records improperly withheld" from the complainant. 5 U.S.C. 552 (a)(4)(B). The State Department is an "agency;" the Library of Congress is not. When the plaintiffs sought the documents, the State Department did not have them. It could not comply with the requests, because it had neither possession nor control. It is therefore hard to see how the State Department "withheld" the notes in violation of the Act. Since the State Department *did* not violate the FOIA, and the Library of Congress *could* not violate the FOIA, there was no occasion for judicial relief.

I

Relief is authorized by the FOIA only when the agency to which the request is made "withholds" the requested materials. 5 U.S.C. 552(a)(4)(B). An agency "withholds" documents in violation of the Act when it refuses to produce requested, nonexempt documents in its custody. Once such withholding occurs, the district courts may employ broad equitable remedies to carry out the Act's commands. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 18–20 (1974). If the agency

gives the documents away and loses custody after "withholding" them, for example, a court could order retrieval and production in accordance with the FOIA. If the agency loses custody before the request is made, however, there is no withholding because the agency's lack of possession is a complete answer to the FOIA request. Because there is no violation of the Act, the court is not authorized to provide any remedy.

In the present case, the State Department did not have possession of the notes at the time the requests were made. On October 29, 1976, the notes were removed to a vault in New York. On December 24, 1976, the notes were transferred to the Library of Congress. Only thereafter did MAP and the RCFP requesters seek the notes under the FOIA. The State Department did not "withhold" the documents because it did not have them. Because there was no withholding there was no occasion for the district court to invoke its broad remedial powers.

The district court did not explicitly find any withholding by the agency of the notes. The court's rationale evidently was that the State Department should have retained the notes, and that the court therefore could restore them to the agency so that they would be available for FOIA inspection. The FOIA, however, does not require retention of any particular records. To the contrary, the Records Disposal Act of 1943, 44 U.S.C. 3301–3314, the Federal Records Act of 1950, 44 U.S.C. 2901–2909, 3101–3107, and records-management programs established by federal agencies permit, and sometimes require, the disposal of millions of agency records annually. In the absence of a pending request, nothing in the FOIA interferes with agency decisions to retain or to dispose of agency records.

The district court's conclusion that the State Department should have retained the notes thus must rest on an interpretation of the Records Disposal Act of 1943, the Federal Records Act of 1950, or the agency's records management program. But even if the notes were "records" under these provisions, and the notes were improperly removed, the sole remedy authorized by Congress is an action by the Attorney General to retrieve the records under 44 U.S.C. 3106. There is no statutory private right of action to enforce an agency's duties under these Acts, and there is no reason for the courts to create such a remedy. The duties with respect to records are intended to benefit only the government in general and the public at large, not any special class of persons; there is no indication of any legislative intent to create a private remedy, and implication of such a remedy would tend to frustrate the scheme of the records acts. *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), slip op. 9; *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 10-15; *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 32-33; *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Therefore, even if the notes are records that should have been retained by the agency, the district court was not authorized to order their return at the behest of a private plaintiff. Our conclusion that neither the FOIA nor the records acts authorize the relief granted here, if correct, is dispositive of the entire case.

II

The FOIA requires production of "records" and "agency records," which it apparently treats as synonyms. The courts in this case apparently equated

these terms with "record" as used in the Records Disposal Act and the Federal Records Act, which is (44 U.S.C. 2901, 3301):

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them.

The courts held that the telephone notes are records within the meaning of this definition. We agree with the courts below that the FOIA applies to at least all records within the meaning of 44 U.S.C. 3301. If, contrary to our primary submission, the Court holds that a district court, in an FOIA suit, may order an agency to retrieve documents that are "records" under the Federal Records Act of 1950, in order to satisfy an FOIA request, it will be necessary to consider whether the notes are "records" within the meaning of 44 U.S.C. 3301.

Within the limitations set by the Federal Records Act, each agency is required to establish a records management program that defines "record" and "nonrecord" materials for the purposes of the agency. The agency must strike an appropriate balance between preserving documentation sufficient to record the actions of the agency and minimizing size of federal files. 44 U.S.C. 2902, 3101, 3102. Once designated as a "rec-

ord," a document may not be alienated or destroyed without the consent of the Administrator of General Services. 44 U.S.C. 3314. "Nonrecord" materials, however, may be relinquished without approval of the Administrator. 41 C.F.R. 101-11.401-3(d). The scheme of the records acts thus comprehends three categories of documents: (a) "records," which must be retained by the agency and which can only be alienated or destroyed with the consent of the Administrator of General Services; (b) "nonrecord" materials, such as preliminary notes, which an agency may choose to discard when their usefulness ends, and (c) "personal" documents of employees. The first two categories are the property of the United States. All documents in the first category are "agency records" under the FOIA and at least some, if not all, documents in the second category are. The last category belongs to the individual employee or official and is subject to neither FOIA disclosure nor the records act.

In the present case, Kissinger contends that the telephone notes fall into the category of personal materials. We disagree. The notes were made in the course of Kissinger's official duties for the purpose of recording agency business and assisting him and other government employees in discharging their official responsibilities; they were thus the property of the United States. But the State Department's authority to manage and dispose of unneeded documents allows it to permit employees to retain nonrecord, unclassified materials rather than destroy them. If an employee, acting in an authorized way, retains nonrecord materials, they become the property of the employee, even if the information in them does not.

The traditional point for relinquishing nonrecord materials to officials and employees is on their departure from the agency. An agency has the authority to relinquish the materials prior to the official's departure, but, in this case, even if the notes were nonrecord materials, the State Department's records management regulations required Kissinger to maintain the notes concerning agency business in a working file belonging to the agency—separate from his personal files—until their usefulness to the agency was at an end. Kissinger's notes continued to be useful in the preparation of extracts of significant discussions until his departure. The notes pertaining to agency business, therefore, belonged to the agency throughout Kissinger's tenure as Secretary of State.

Whether the notes at issue in this case were "record" materials or "nonrecord" materials, however, depends on (i) the extent to which the Federal Records Act and the Records Disposal Act permit the State Department to classify them as nonrecord materials, and (ii) whether the records management program of the State Department in fact classified the notes as records or nonrecord materials. The Legal Adviser of the State Department concluded that statutes and the agency's record management regulations permitted the agency not to treat the notes as record materials so long as extracts were made of the business portion of the notes for the permanent files. The Archivist of the United States disagrees. It is very difficult to resolve this issue on this record. Neither the notes nor the extracts are before the Court. It is impossible to judge the extent to which the extracts adequately documented the agency business in the notes without actually comparing the

extracts with the notes. Although we set forth the considerations that might guide a resolution of these issues, we conclude that these issues should not now be resolved.

III

If the Court agrees with our argument in Part I, it follows directly that petitioners in No. 78–1217 are no more entitled to the notes made before Kissinger became Secretary of State than they are entitled to the notes made while he was Secretary of State. The notes were not generated at the State Department. They were merely materials, such as personal books, diaries, and private correspondence, that Kissinger took with him when he left the White House. The fortuity that he happened to keep them at his office at the State Department did not place them in the custody and control of the State Department. The State Department could not "withhold" what it did not possess.

But even if the Court rejects our argument in Part I, petitioners are not entitled to the notes made by Kissinger at the White House. Petitioners concede (78–1217 Pet. 6–7) that they are not entitled to any notes that pertain to Kissinger's activities other than those that "relate to the affairs of the National Security Council" (78–1217 Pet. 11). They contend that the National Security Council is an "agency" under FOIA. Even so, relief should be denied. First, Kissinger was not an employee or official of the NSC. His notes that "related to" activities of the NSC were thus no more NSC records than his notes, if any, relating to the Department of Agriculture were that agency's records. Second, a document that simply passes through an agency, a document created elsewhere and not reflecting on the agency's performance, is not an "agency record." Here, the notes were never transferred by the NSC to the State Department for its use. All that happened was that Kissinger, by chance, happened to keep the notes at his office at the State Department rather than elsewhere. Third, the RCFP requesters never sought the documents from the NSC. If the NSC is an agency under the FOIA, then surely the requesters should have made a request of the agency whose records the notes allegedly were rather than of the State Department, which was essentially a stranger to them.

IV

If the Court disagrees with our arguments and holds that any portion of the notes is subject to FOIA disclosure, then it should reject Kissinger's argument that processing of the notes would violate his constitutional right of privacy. This argument is foreclosed by *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455–465 (1977), which held that the screening of tapes made in the Oval Office for possible release, and the review of all written materials by the Administrator, did not violate President Nixon's constitutional interests. Kissinger's position is no stronger than Nixon's. Like the Nixon materials, the Kissinger notes were made in the course of discharging his official responsibilities. Indeed, unlike Nixon, Kissinger prepared the notes for the purpose of sharing them with other employees of the State Department. It may be that the notes indiscriminately commingle purely personal matters with official matters. That, however, was the result of Kissinger's instructions that the notes be made indiscriminately. If the Court holds that the statutory goals of the FOIA or the records acts require that the notes be returned to the State Department, those goals

may not be defeated by Kissinger's decision to mix private affairs with public business.

ARGUMENT

I

NEITHER THE FOIA NOR THE FEDERAL RECORDS ACT AUTHORIZES AN ORDER TO RETRIEVE RECORDS RELINQUISHED BY AN AGENCY PRIOR TO ANY FOIA REQUEST TO INSPECT THEM

The remarkable thing about the district court's opinion (which was adopted by the court of appeals) is that it awarded extraordinary equitable relief under the FOIA without ever finding that a violation of the FOIA had occurred. The court apparently found that the Federal Records Act of 1950 (or State Department regulations) had been violated by an improper removal of the notes. It then invoked its equitable jurisdiction under the FOIA to restore the notes to the agency for disclosure under FOIA. This holding necessarily means that anyone may sue an agency and compel it to retrieve records removed in violation of the agency's records-management rules; it supplies, in effect if not in design, a private right of action to enforce the records act. This holding cannot be reconciled with the fact that (a) neither the Federal Records Act of 1950 nor the Records Disposal Act of 1943 creates a private remedy to enforce agency record-keeping obligations and (b) nothing in FOIA or its legislative history purports to supply such a private remedy.

A. *Neither the Federal Records Act Nor The Records Disposal Act Creates a Private Remedy To Enforce Agency Record-Keeping Obligations*

Once a document achieves the status of a "record" under the Records Disposal Act, 44 U.S.C. 3301-3309,

it may not be alienated or disposed of without the consent of the Administrator of General Services, who has delegated his authority in such matters to the Archivist of the United States. 44 U.S.C. 3303-3303a, 3308-3314; GSA, Delegations of Authority Manual ADM P 5450.39A.[16] A "record" includes any document (i) "made or received by an agency under Federal law or in connection with the transaction of public business" and (ii) "preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them." 44 U.S.C. 3301.

This definition makes a document's status as a "record" depend on the circumstances of the particular agency involved. What is "appropriate for preservation" by one agency may be waste paper for another. It is understandable, therefore, that the Federal Records Act of 1950, 44 U.S.C. 2901 *et seq.*, authorizes the "head of each Federal agency" to establish a "records management program" to define the extent to which documents are "appropriate for preservation" as agency records. Such a program must, on the one hand, assure

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[16] This does not mean, however, that the Archivist must inspect each document before it is disposed of. Agencies may submit to the Archivist lists of categories of records proposed to be disposed of after specified retention periods. 44 U.S.C. 3303 (2). Once the Archivist approves the category and the retention period, documents within the category may be disposed of without further approval by the Archivist. The State Department, for example, has collected all such approved categories in Appendices A and B to the U.S. Department of State, *Records Management Handbook* (1977). The retention periods for the numerous categories of documents range from a few months to permanent retention.

"adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency," 44 U.S.C. 3101, and, on the other hand, "prevent the creation of unnecessary records." 44 U.S.C. 2902(3). Within these limits, the agency head must determine the proper balance for the record keeping needs of the agency and must determine the extent to which rough notes and work aids should be retained as agency records. Those that the agency requires to be retained become "records" under the Act, and those not required to be retained are called "nonrecord materials." See 41 C.F.R. 101-11-401.3.d[17]

[17]The agency also must "cooperate" in applying the guidelines for records management promulgated by the Administrator of General Services, who is required by the Federal Records Act to assist agencies in achieving the purposes of the Act. See 44 U.S.C. 2904(2) and 3102(2). The Administrator is directed to "provide guidance and assistance to Federal agencies with respect to records creation, records maintenance and use, and records disposition." The Administrator has the responsibility to "promulgate standards, procedures, and guidelines with respect to records management and record management studies," to "conduct research with respect to the improvement of records management practices and programs," to "serve as a clearinghouse for information with respect to records management and as a central source for reference and training materials with respect to records management," to direct the continuing attention of Federal agencies and the Congress on the burden placed on the Federal Government by unnecesarry paperwork, and on the need for adequate policies governing records creation, maintenance and use, and disposition * * * ." 44 U.S.C. 2904. The Administrator may inspect the records of records management practices of any agency for the purpose of making recommendations for improvement. 44 U.S.C. 2906. The agency's records program must provide for "cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records," 44 U.S.C. 3102(2), and it must comply with "sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them."

The Federal Records Act establishes only one remedy for the improper removal of a "record" from the agency. 44 U.S.C. 3106 requires the head of the agency to notify the Attorney General if he determines or "has reason to believe" that records have been improperly removed from the agency; it authorizes the Attorney General, "with the assistance of the Administrator," to bring suit to recover the records. Nothing in the Act authorizes a private party to bring a retrieval suit, and nothing authorizes a private suit to compel the Attorney General to bring suit.[18]

No such private remedy should be implied. The question whether there should be such a remedy is entirely

[18]There has been no attempt to compel the Attorney General to bring suit. Compare *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), with *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975). The refusal of an agency to commence proceedings to retrieve documents ordinarily would be an unreviewable act of prosecutorial discretion. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *FTC* v. *Universal-Rundle Corp.*, 387 *U.S.* 244 *(1967); Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *FTC* v. *Klesner*, 280 U.S. 19, 25 (1929). 44 U.S.C. 3106, however, states that the head of the agency "shall" attempt to recover documents through the Attorney General where he "has reason to believe" agency records have been "unlawfully removed." Arguably, therefore, the decision of the agency head (although not the decision of the Attorney General) is subject to review under the Administrative Procedure Act, 5 U.S.C. 701-706. We do not discuss this question in light of the failure of any party to seek APA review. Even if judicial review is unavailable, however, it hardly means that an agency's failure to retreieve "records" pursuant to 44 U.S.C. 3106 escapes review. The Administrator is authorized to inspect agency records management practices and to request agency heads to bring such retrieval actions. 44 U.S.C. 2905-2906. If encouragement fails, the Administrator may report the agency to Congress. See 44 U.S.C. 3303a(f). Congress or the President may inquire into whether the agency head justifiably declines to retrieve documents alleged to be records under the Federal Records Act.

one of statutory construction. And in answering that kind of question, the Court has considered four factors: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the states. *Cort* v. *Ash*, *supra*, 422 U.S. at 78; *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), slip op. 9. The first three factors—the factors "traditionally relied upon in determining legislative intent"[19]—preclude any implied remedy in this case.

First, there is no "class for whose *especial* benefit the statute was enacted." *Cort* v. *Ash*, *supra*, 422 U.S. at 78 (emphasis in original). The Federal Records Act was enacted to facilitate the internal management of the government, or as the Senate Report put it, the "administrative and executive" needs of the agency:

> It is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. There is danger of this simple, self-evident fact being lost for lack of emphasis. The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.

S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950) (FRA Senate Report). There is no suggestion in the Act or its legislative history that Congress imposed record keeping obligations on agencies for the purpose of benefitting particular members of the public who desired to inspect them. It may be that the public as a whole benefits from adequate recordkeeping, but that kind of benefit does not run to a special class and thus does not support an implied private right of action. See *Cannon* v. *University of Chicago*, *supra*, slip op. 11 n. 13 (the nature of the right or duty is the most important indicator). No part of the statute creates personal rights that any agency make or keep particular records. The structure of the statute is inconsistent with any such right. No agency needs to create any particular record; in particular, nothing required Kissinger to create the notes.[20]

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[19] *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 15. The fourth factor has no application in this case. It concerns whether a private federal remedy may interfere with a state's regulation of a concern of the state. Federal records management is exclusively a concern of the federal government, and accommodating federal remedies with state concerns is therefore unnecessary.

[20] The district court stated (Pet. App. 56a) that a State Department regulation required Secretary Kissinger's staff to listen to his conversations and make notes. The Legal Adviser of the Department of State concluded, to the contrary, that the regulation did not require the creation of the notes (A. 83a). The district court gave no reason for holding that the Legal Adviser's opinion is wrong; certainly the Legal Adviser's opinion "is not plainly inconsistent with the wording of the regulations* * *." *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). See note 34, *infra*. The district court therefore erred in rejecting the State Department's construction of its regulation. But even if the court were right, however, and the regulation required the creation of the notes, it would not follow that the regulation also required their retention after adequate extracts had been prepared.

And records, once created, can be destroyed with the Archivist's approval. It must follow that no one's personal rights were violated by the fact that the State Department did not keep Kissinger's notes. And without a violation of personal rights, there is no justification for the implication of a private right of action to compel acquisition or retrieval of particular records.[21]

Second, there is no legislative intent, explicit or implicit, to create a private remedy. The legislative history shows that the Records Disposal Act was intended to provide an orderly procedure for disposal of records of insufficient value to justify the cost of retention. H.R. Rep. No. 559, 78th Cong., 1st Sess. (1943). Although the Act directed agencies to dispose of documents only in accordance with the procedures in the Act, see 44 U.S.C. 3314, nothing in the legislative history suggests that members of the general public may enforce this obligation. As for the Federal Records Act of 1950, the legislative history shows that it was intended to require agencies to create documents adequate to record the essential business of the agency—but no more. FRA Senate Report at 2, 4. See U.S. Commission on Organization of the Executive Branch of the Government, *Task Force Report on Records Management in the United States*

[21] This case is therefore quite unlike *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, No. 77-1645, set for reargument (Apr. 30, 1979), in which we have argued that a private right of action should be implied to enforce the fiduciary duty rules created by the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 to 80b-17. Fiduciary duties imply personal rights, running to identified beneficiaries. The strength of the personal right in *Transamerica* calls for acknowledgement of a private remedy, just as the lack of any personal right here calls for confining remedies to the one identified by the statute—suit by the Attorney General.

Government 4, 6, 9 (1948). Although the Act directs the Administrator of General Services to provide guidance to agencies in developing records management programs and directs the Administrator to notify the agency head of any unlawful removal of records coming to his attention (see 44 U.S.C. 2905), the legislative history does not suggest any private remedy whatever for the failure of the agency to abide by its obligation under the Act or under records management programs established thereunder. See FRA Senate Report at 15; H.R. Rep. No. 2747, 81st Cong., 2d Sess. 14 (1950). There is no history of comparable private suits, and no analogous right at common law. The silence of the legislative reports thus reflects an assumption so plain as to be beyond doubt: no one thought that housekeeping statutes for the Executive Branch could be enforced in private suits. To imply a private remedy in the fact of such silence "is a hazardous enterprise, at best." *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 10.

Third, a private remedy would frustrate a legislative scheme that allows agency heads to decide what should or should not be regarded as "records" and, even if they are, whether they are worth retrieving. The Acts give the Attorney General and the Administrator of General Services—Executive Branch officials—the "policing" power. To require agencies to defend their judgments in these matters under the Federal Records Act in every FOIA case in which the agency had not retained the records would substantially disrupt records management programs. A private party could argue, for example, that certain FBI records should be kept for 20 years rather than 10. Resolution of such disputes would be burdensome because each would turn on the specific

types of transactions involved, the specific need of each agency for a permanent record of the transactions, and the type of record that would suffice. Disparate judicial decisions could make recordkeeping both risky and cumbersome. The pressure of such suits would encourage agencies to retain or retrieve more and more materials to avoid FOIA suits—all to the frustration of the goal of the Federal Records Act to reduce federal records to the minimum necessary (see note 28, *infra*). Rights of action by private parties thus would interfere with the operation of agency housekeeping and would amount to an undesirable second-guessing of enforcement decisions made by the Attorney General. The Court has declined to imply private rights of action from a statute in these circumstances. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974).

B. *The FOIA Does Not Create A Private Remedy To Enforce Agency Obligations To Retain Or Retrieve Records*

Neither the language nor the legislative history of the FOIA refers to the Records Disposal Act, the Federal Records Act, or any other record keeping obligations. See S. Rep. No. 813, 89th Cong., 1st Sess. (1965) (FOIA Senate Report); H.R. Rep. 1497, 89th Cong., 2d Sess. (1966) (FOIA House Report).[22] Under such circumstances, it would be incongruous to find in the FOIA an unexpressed intent to supply what Congress omitted from the records acts. Each law stands independently and is enforced only through the procedures provided in each Act. For example, the Federal Records Act requires agencies to *create* documentation of its essential decisions and policies. But the FOIA may not be used to force an agency to create any document, even one that the Federal Records Act requires. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975). In short, the rights of an FOIA plaintiff are neither improved nor diminished by any obligations agencies may have to create, to retain, or retrieve documents under the Federal Records Act.

The FOIA establishes only one remedy—an action in the district court to prevent an agency from "withholding" documents to which the FOIA applies. 5 U.S.C. 552(a)(4)(B). An agency "withholds" a document only when it declines to produce one in its possession. As the Attorney General's memorandum explaining the provisions of the FOIA states, the Act "refers * * * only to records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23–34 (1967). Accord, *Forsham* v. *Califano*, 587 F.2d 1128 (D.C. Cir. 1978), cert. granted, No. 78–1118 (May 14, 1979).

The FOIA does not require an agency to *keep* any documents, and the decision to dispose of a document thus cannot be an unlawful withholding. Neither the

[22] The same is true of the FOIA amendments in 1974 and 1976. H.R. Rep. No. 93–876, 93d Cong., 2d Sess. (1974); S. Rep. No. 93–854 (Part 1), 94th Cong., 2d Sess. (1974); S. Rep. No. 94–354, 94th Cong., 1st Sess. (1975); S. Rep. No. 94–1178, 94th Cong., 2d Sess. 24–25 (1976); H.R. Rep. No. 94–880, 94th Cong., 2d Sess. 23 (1976).

statutory language nor the legislative history suggests that Congress wanted agencies to create or retain documents merely to be able to respond to FOIA requests. To the contrary, the central concern was preventing agencies from "withholding" materials actually in their possession. The FOIA replaced the "public-information" section of the Administrative Procedure Act, ch. 324, Section 3(c), 60 Stat. 2387, which required that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." Congress found that this provision gave the agency too much discretion to decide what should be public and provided no judicial remedy for wrongful withholding. FOIA Senate Report at 5; FOIA House Report at 4-9; see also *Attorney General's Manual on the Public Information Section of the APA* 24 (1947). Two of the central goals of FOIA were to reduce that discretion by requiring production unless one of nine exemptions applied and to supply judicial redress for "withholding." FOIA House Report at 2, 5-6, 8-9; FOIA Senate Report at 5-6. The FOIA thus addressed agencies' withholding what they had in their possession; Congress simply was unconcerned in 1966 with what should be in the agencies' possession.[23]

Moreover, to construe the FOIA to require agencies to retrieve documents would present an enormous practi-

[23] Neither of the courts below found that the agency released the notes in anticipation of the subsequent requests for the purpose of defeating FOIA disclosure. This case does not, therefore, present the issue of the extent to which, if at all, such anticipatory relinquishment of records might constitute a "withholding."

cal problem. Every year millions of documents flow in and out of agencies. Many are examined only briefly and forwarded to other agencies or to the private parties to whom they belong. The Federal Records Act contemplates that such documents need not be acquired or retained by agencies; indeed, it requires, in many cases, that the documents be transferred or destroyed. It is inconceivable that in enacting the FOIA Congress silently disrupted this established practice and imposed, without saying so, a duty to retain or to retrieve documents.[24]

A Freedom of Information Act request thus entitles the requesting party to examine only those agency records in the agency's possession at the time the request is made. See *Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (S.D.N.Y. 1977); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (D. Kan. 1971), aff'd, 460 F.2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972). This construction gives "withhold" its natural meaning. An agency "withholds" a document within the meaning of Section 552(a)(4)(B) only when it refuses to produce documents in its custody. Once such withholding occurs—and a transfer after an FOIA request could well be a withholding, just as any other kind of refusal to produce available documents is a withholding—a court may exercise broad equitable powers to remedy the violation, even if this means compelling production

[24] A related problem is presented by the millions of private documents in the hands of private contractors, which agencies have a right to examine. See *Forsham* v. *Califano*, *supra*. We argue in *Forsham* that FOIA does not require an agency to procure such information so that it can be inspected.

of the withheld document from a third party.[25] Cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 18–20 (1974). If the agency does not have custody of the document at the time the request is made, however, there is no withholding—and no occasion for any judicial remedy.[26]

The error of the courts in this case, then, was in imposing a remedy without first finding that the agency had "withheld" records. Because the notes were not in the possession of the State Department at the time MAP and the RCFP requesters asked for them, the agency did not withhold the notes.[27] That should have been the end of this case.

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[25] The court, in exercising its equitable powers, might order the agency to retrieve the documents by either a retrieval action under Section 3106 of the Federal Records Act of 1950 (if the documents were "records") or a replevin action (if the documents were nonrecord materials belonging to the United States). If, as here, the court had personal jurisdiction over the custodian of the materials, it could order the transfer directly.

[26] There may be a number of questions in determining whether an agency has "custody" of the documents. *Forsham* v. *Califano*, *supra*, presents one of them. Others can be imagined. If, for example, documents were in the control of an agency but located in the home of its employee, the agency would have custody; but if the employee held them under a (disputed) claim of right, the outcome is not so clear. We express no view here on the many different patterns that could arise. The present case is an easy one, because the State Department had neither possession nor an undisputed right to obtain possession of the notes.

[27] The Safire request was made before the transfer of the notes to the Library of Congress. No withholding took place with respect to this request, however, because the State Department *never* had possession or control of the notes made while Kissinger was Assistant to the President for National Security. See pages 52–53, *infra*. A fortiori, the agency was not required to obtain them.

II

THE PRESENT RECORD IS INSUFFICIENT TO DETERMINE WHETHER THE NOTES ARE RECORD OR NONRECORD MATERIALS

If, contrary to our primary submission, the Court holds that there is a private right of action to compel the return of "records" removed before any FOIA request for them is made, it would become necessary to consider Kissinger's contention that the notes are not "records" under the Federal Records Act. If the notes are not "records," Kissinger argues, their removal was proper and any private action would fail on the merits. If the notes are not "records" but "nonrecord" materials, it also would be necessary to consider whether a private plaintiff may compel retrieval of such "nonrecord" materials. In our view, final resolutions of these questions are inappropriate at this time, because the grant of summary judgment by the district court precluded the creation of an adequate record.

A. *Removal of Nonrecord Materials May Be Authorized by Law*

The FOIA requires the production of "records" or "agency records," which it apparently treats as synonomous. The FOIA does not define either term. We agree with the apparent assumption of the courts below that "agency records" under FOIA includes at least all "records" under the Federal Records Act. As we have discussed, documents are "records" under the Federal Records Act of 1950 if they are (i) "made or received by an agency" in connection with "the transaction of public business" and (ii) are "preserved or ap-

propriate for preservation by that agency" as evidence of the "organization, functions, policies, decisions, procedures, operations or other activities of the Government" or because of "the informational value of data in them." 44 U.S.C. 3301. The head of each agency must identify in the first instance what type materials are "appropriate for preservation by [the] agency." See pages 27-28, *supra*.[28]

[28] Federal legislation on this subject has conferred on the agency greater and greater discretion to determine, in the first instance, whether a document should be deemed a record. The First Congress authorized the executive departments to issue regulations regarding custody, use, and preservation of records. See 1 Stat. 28, 49, 65, 68, 553; see also 9 Stat. 395; 16 Stat. 163; 17 Stat. 283, 284; 18 Stat. 169. These "housekeeping" provisions eventually were combined in a single, general statute. See 5 U.S.C. 301. In 1853, Congress made it a crime to destroy, deface, or take away any "public records." See Act of Feb. 26, 1853, ch. 81, Section 4, 10 Stat. 170, modified, Act of Mar. 4, 1909, ch. 321, Section 128, 35 Stat. 1111, now codified at 18 U.S.C. 2071. This made it necessary to obtain congressional approval to dispose of unneeded records. In 1889, Congress enacted the first government-wide disposal statute, which directed the head of each executive department to submit to Congress lists of files no longer needed for current business and proposed for disposal. Act of Feb. 16, 1889, ch. 171, Section 1, 25 Stat. 672. Congress continued to review the lists until 1970 when, having "found it impossible to maintain comprehensive surveillance over the disposition of an extremely heavy volume and variety of executive papers," Congress gave the Administrator of General Services the final word on the approval of disposal schedules. S. Rep. No. 91-914, 91st Cong., 2d Sess. 2 (1970); see 84 Stat. 321.

In 1943 the Records Disposal Act provided an alternative to the disposal-list method of managing agency documents, which could not keep pace with the mounting volume of federal records. For the first time, Congress defined the term "record," a definition which has remained unchanged and is now codified a 44 U.S.C. 3301. Significantly, Congress adopted the definition in order to "place the responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved" and to "make it clear

All government documents that do not qualify as "records" under an agency's records management program are "nonrecord materials." Such materials belong to the government, but they are not preserved as "records" by the agency. The Administrator of General Services has published guidelines to all agencies stressing that "[n]onrecord materials, such as * * * preliminary worksheets, and similar papers that need not been made a matter of record, shall not be incorporated in the official files of the agency." 41 C.F.R. 101-11.401-3(d).[29]

that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943).

The Federal Records Act was enacted in 1950; it required "the head of each Federal agency" to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency * * *." 44 U.S.C. 3102. The Senate report stressed that "[i]t is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950). See generally U.S. Commission On Organization of the Executive Branch of the Government, *Task force Report on Records Management in the United States Government* (1948).

In sum, since at least the 1943 Congress has stressed the need to streamline agency document procedures to assure that the agency records contain "adequate" documentation of agencies' organizations, functions, policies, decisions, procedures, operations or other activities or valuable information—but no more. In achieving this balance, Congress has stressed that "not every scrap of paper on which writing or printing appears" need be retained as an "agency record," and that the "head of each Federal agency" has the responsibility "in the first instance" to sift record material from nonrecord material.

[29] One decision has held that such preliminary notes, voluntarily made by government engineers in the course of their employment to assist them in doing their work, were the personal

An agency employee typically has a third category of documents in his office—materials that belong to him personally, such as a personal library, private correspondence, or a diary. Such personal materials do not include, however, information gathered by a government official or employee within the scope of his employment for the purpose of recording transactions related to the official's employment and guiding the activities of other government employees. Such information belongs to the United States. See, *e.g.*, *United States* v. *First Trust Co. of St. Paul*, 251 F.2d 686, 688 (8th Cir. 1958); *Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970); *United States* v. *Chadwick*, 76 F. Supp. 919, 923 (N.D. Ala. 1948); *Sawyer* v. *Crowell Pub. Co.*, 46 F. Supp. 471, 473 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir.), cert. denied, 323 U.S. 735 (1944); *Nixon* v. *Sampson*, 389 F. Supp. 107, 133–134 (D.D.C.), stayed *sub. nom. Nixon* v. *Richey*, 513 F.2d 427 (D.C. Cir. 1975), dismissed as moot, 437 F. Supp. 654 (D.D.C. 1977); cf. *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962), decision on remand, 268 F. Supp. 444, 448–449 (D.D.C. 1967). That the notes were prepared in the course of Kissinger's responsibilities as Secretary of State seems clear enough. Any doubt on that score is eliminated by the State Department's policy, which prohibited employees from monitoring tele-

property of the employees because the employees showed the notes to no one else. *Porter County Chapter of the Izaak Walton League* v. *AEC*, 380 F. Supp. 630, 633 (N.D. Ind. 1974). In the present case, however, Kissinger used the notes to record agency business, not simply as a means of communicating with himself, and circulated the information to other officials in the State Department.

phone calls except where "deemed absolutely essential to the conduct of business" (A. 122a–126a).[30]

Kissinger does not contend that the notes were his personal property ab initio. He argues, instead, that the notes were nonrecord materials, but that "[i]f such materials are not to be filed as official records, they may be discarded or kept as the employee chooses," and that "[i]f the employee chooses to keep the materials, his personal files are the logical place in which to store them" (78–1088 Pet. Reply Br. 5–6 n.11). He essentially argues that, because he could have thrown the notes away, no one may object if he treats them as his personal property.

Given their statutory duty to manage and dispose of documents, agencies have authority to relinquish unneeded nonrecord materials to departing officials. Once this occurs, the copies of such materials belong to the officials, even if the information in them does not. The State Department's records management program, for example, allows a departing employee to retain copies of nonclassified materials related to his employment. 5 FAM 417.1. This is common practice.[31] See National Study Commission on Records and Documents of Federal Officials, *Final Report* 17–19 (1978). Similarly, a records management program, either explicitly or by well defined custom, might allow a departing employee to retain the originals of unneeded nonrecord materials; it would be senseless to make

[30] We assume that notes of Kissinger's purely personal affairs are his personal papers. Our discussion is limited to those notes containing references to agency policies, decisions and other agency transactions.

[31] Extra copies are specifically excluded from the statutory definition of "record." 44 U.S.C. 3301.

photocopies for the employee only to "dispose of" the originals. Until the relinquishment occurs, however, all such materials remain the property of the United States (see A. 201a, 216a, 221a-222a, 227a, 233a, 237a, 262a).[32]

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[32] This analysis, we think, best explains the tradition of departing cabinet officers retaining their working files, which otherwise would be thrown out. See National Study Commission on Records and Documents of Federal Officials, *Final Report* 13-16, 29-32 (1978). In this tradition the Manuscript Division of the Library of Congress acquired by deed the public papers of at least 41 Cabinet members including nine Secretaries of State (prior to acquiring Kissinger's papers). Library of Congress, *Report to the National Study Commission on Records and Documents of Federal Officials: Personal Papers of Federal Officials* 35-37 (1976).

In at least two recent administrations, "cabinet papers" have been circulated to departing cabinet members to explain what papers they might take with them. Both papers acknowledge that "records" within the meaning of the Federal Records Act must remain behind but observe that agencies have some discretion in defining what is a record. The papers suggest that cabinet officers may retain extra copies of nonclassified record materials and may retain preliminary notes and other nonrecord materials. See Removal of Papers By Retiring Department And Agency Heads, White House Cabinet Paper, July 27, 1959, at 3; Memorandum of National Archives and Records Service, GSA, Donation of Personal Papers to the Richard Nixon Library (Nov. 1972) (A. 261a-264a); Memorandum of the Department of State to the National Study Commission on Records And Documents of Federal Officials (A. 199a-209a).

Although it is true that a number of presidents have regarded papers generated in the White House as their personal property, this Court has never addressed the matter. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 445 n. 8 (1977). Attorney General Saxbe rendered a formal opinion that such materials belong to the President in light of unique historical considerations. 43 Op. Atty. Gen. 1 (1974), see also *Folsom* v. *Marsh*, 9 F. Cas. 342, 345 (1841) (Story, J.) (as against claim by private party, the presidential papers of George Washington were his personal property); cf. *In re Roosevelt's Will*, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947) (President

Consequently, if our primary submission is incorrect, resolution of this controversy must turn on application of these principles: (1) within the limits imposed by the Federal Records Act, agencies have discretion to draw the line between record and nonrecord materials for their own purposes, and (2) an agency may dispose of unclassified nonrecord materials by allowing the employee to retain them as his personal papers, but they do not become his property until the agency relinquishes them to him; once relinquished under an agency rule, the documents are the personal papers of the employee and are not subject to the FOIA or the records acts. These principles determine whether the notes are record or nonrecord materials.

B. *The Record Does Not Permit Resolution Of The Question Whether The Notes Are Records Or Nonrecord Materials*

It is not possible to apply to this case the principles we have set out. The problems stem from the fact that the State Department's records management regulations do not address the status of Kissinger's notes, that the interpretation of the regulations by the Legal Adviser is ambiguous in certain respects, that the record does not fully describe any custom and usage at the State Department with respect to retention of such notes, that the notes are not in the record, and that the extracts are not in the record.

Roosevelt's gift of his papers to the United States valid); see generally National Study Commission *Final Report*, *supra* at 13-16, 29-32. There is no need to pursue this analogy, however, because Congress has changed the rule. Effective January 20, 1981, almost all presidential materials will be the property of the United States. See Pub. L. No. 95-591, 92 Stat. 2523, 2524, 2528.

The Department of State's records management program appears at 5 FAM 410 *et seq.*, and The Records Management Handbook of the Department of State (1968) ("Handbook").[33] The program does not explicitly address the status of the telephone notes. It requires that "discussions of significance * * * by telephone" be summarized for the permanent files (5 FAM 423.2-1):

> Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file.

This regulation does not, however, require the creation of notes of the sort at issue here. It requires only that *information* of significance be permanently recorded, not that notes be created or retained after the information has been incorporated in final memoranda. To the contrary, "working files," which include "rough drafts and working papers" are to be "disposed of as soon as they have served their purpose." Handbook ¶271-272. It is enough that "decisions, commitments, and discussions of any significance" referred to on the phone be summarized and entered in agency files.[34]

[33] In general, the agency's Foreign Affairs Document and Reference Center is responsible for the staff supervision, coordination, and management of files, records equipment, forms, administrative reports, correspondence, directives, mail flow and procedural studies and records disposition. The Center is responsible for developing standards that assure "[a]dequate and proper documentation of the Department's activities" while creati[ng] "only those records essential to the conduct of current business." 5 FAM 414.1.

[34] The district court evidently concluded that Kissinger was required to create the notes (Pet. App. 56a, 58a) and that required documentation constituted records. This is not so. See note 20, *supra*. The State Department's rules only required Kissinger to make a record of "[d]ecisions, commitments, and discussions of any significance * * *." 5 FAM 423.1. Kissinger was free to do this from memory or to make preliminary notes that could be thrown away after the final record was made. This was the view of the Legal Adviser and is plainly correct.

Personal correspondence that discusses matters of official policy also is treated in this way. In such a case, the personal correspondence must be placed in the agency files unless the portions pertaining to functions or activities of the Department or a post are extracted and made part of official records.[35]

For these reasons, among others, the Legal Adviser determined that the telephone notes need not be entered in the agency records but required that extracts of official matters reflected in the notes be made part of the agency files (Pet. App. 65a-69a).[36] This determina-

[35] See 5 FAM 432, which provides:

> Papers of a personal character which pertain only to an individual's private affairs and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times. When official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the Department or a post is to be extracted and made a part of the official records. Official-informal letters are official records and as such are subject to the same laws, regulations, and legal restrictions governing their maintenance and disposition as those relating to any official documents.

[36] This conclusion is in substantial accord with the Administrator's guidelines issued under 44 U.S.C. 2904. The guidelines call for controls "to insure that important policies and decisions are adequately recorded; that routine operational paper work is kept to a minimum; and that the accumulation of unnecessary files is prevented." 41 C.F.R. 101-11.102-3. The guidelines provide that "[s]ignificant decisions and commitments reached orally (person to person, by telephone, or in conference) should be reduced to writing and included in the record." 41 C.F.R.

tion appears consistent with the records management program adopted by the Department of State, is a reasonable construction of the agency's own rules, and is therefore, insofar as it is applicable, dispositive here. *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The difficulty lies in applying this conclusion to the case at hand. The record does not disclose whether the extracts prepared were sufficient to satisfy this construction of the records management program. Because the record does not contain either the notes or the extracts, they cannot be compared.[37] The record does

101-11.202-2(b). Where "matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files * * * ." 41 C.F.R. 101-11.202-2(d). Concerning preliminary notes, the guidelines state: "Nonrecord materials, such as extra copies of documents preserved for convenience of reference, stocks of processed documents, preliminary worksheets, and similar papers that need not be made a matter of record, shall not be incorporated in the official files of the agency. To the maximum extent possible, material not required for record purposes shall be disposed of; it should not be sent to file." 41 C.F.R. 101-11.401-3(d).

[37] The extracts must be adequate summaries of the transactions recorded within the meaning of 5 FAM 423:1:

> The recording of activities of officials of the Department of State and all of its component elements should be complete to the extent necessary to (a) facilitiate the making of decisions and policies and the taking of actions by the incumbents and their successors in office; (b) fulfill the requirements of Federal statutes; (c) make possible a proper scrutiny, by the Congress and by other duly authorized agencies of the Government, of the manner in which the functions of the Department of State have been discharged; (d) protect the financial, legal, and other rights of the Government and of persons affected by actions of the Department of State; and (e) provides materials for research and historical purposes.

not contain any indication whether the State Department believes the extracts are sufficient for purposes of its records management program. The Legal Adviser himself viewed only some of the notes (evidently ones prepared before Kissinger became Secretary of State), and reviewed none of the extracts, so far as the record discloses (A. 82a, 259a).

If the extracts are insufficient, the notes are arguably "records" because they constitute the only record of important agency transactions, and they would be "appropriate for preservation" as "evidence" thereof. Neither the Legal Adviser's opinion nor the agency's rules address the status of notes that are not properly extracted. In short, in the event the extracts are insufficient, the record does not illuminate the question whether the agency's records management program, perhaps as elaborated by custom and usage, continues to regard the notes as nonrecord material.

C. *Some Nonrecord Materials Are Covered By The FOIA*

Even if the notes have never been "records" under the Federal Records Act, a further difficulty is presented by legal issues concerning the extent to which *non*record materials are subject to FOIA disclosure. We believe some, if not all, nonrecord materials in the custody of an agency are obtainable under the FOIA.[38] The issue remains, however, whether the FOIA

[38] Arguably, only materials that constitute "records" under 44 U.S.C. 3301 are reached by the FOIA. The State Department and other agencies have adopted FOIA regulations that define "agency records" identically with the "records" under 44 U.S.C. 3301. *E.g.*, 22 C.F.R. 6.1 (b); see also 41 C.F.R. 105-60.103(a); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23 (1967). Because the Federal Records Act requires agencies to "make and pre-

reaches nonrecord materials lost by an agency before an FOIA request is made for them. The reliance by the courts below on the fact that the notes were "records" under the Federal Records Act and the seemingly mandatory duty of the agency to retrieve them under 44 U.S.C. 3106 suggest that the courts might have reached a different result if the notes had been nonrecord materials.

Kissinger argues that a finding that the notes are nonrecord materials must require a conclusion in his favor, because (in his view) nonrecord materials are the personal papers of the employee, to keep or to throw away as he pleases. Nonrecord materials, however, plainly belong on their creation to the agency. The agency may determine the time and manner by which, if at all, employees may acquire or retain nonrecord ma-

serve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency" (44 U.S.C. 3101), access to such records ordinarily should be sufficient to enable the public to identify agency rules and decisions, to detect incompetence and corruption, and otherwise to fulfill the goals of the FOIA. See generally *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Department of Air Force* v. *Rose*, 425 U.S. 352, 360-362 (1976); *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). The Act requires agencies to supply the requested records within 10 days except in unusual circumstances. 5 U.S.C. 552 (a)(6)(A) (i). In view of the numerous locations where record materials alone may be maintained—such as regional offices, records centers, and agency headquarters—this severe time limit suggests that Congress did not intend for the agency routinely to sift nonrecord materials, which (by definition) are not in agency files, are not indexed, and are generally known only to the employee possessing them. For examples of "nonrecord" materials held not to be "agency records" for purposes of the FOIA, see *Warth* v. *Department of Justice*, 595 F. 2d 521 (9th Cir. 1979) (judicial transcripts in the possession of agencies); *Goland* v. *CIA*, No. 76-1800 (D.C. Cir. May 23, 1978) (transcript of congressional hearings in the possession of the CIA), pet. for cert. pending,

terials. Although we agree that once relinquished, nonrecord materials become the personal papers of the employee and are not subject to the FOIA, the State Department's records management program required retention of the notes (even if nonrecord materials) as agency "working files" so long as they are needed to prepare extracts recording significant oral communications. "Rough drafts and working papers," which seem to describe the notes, should be placed in "working files." *Handbook* at ¶272. 'Office working files," however, "are not considered personal files," *id.* at ¶188, and must be kept separate from personal files. *Id.* at ¶273. Working files may be "disposed of" only when no longer needed. *Id.* at ¶271. In view of Kissinger's re-

No. 78-1924; *Cook* v. *Willingham*, 400 F.2d 885 (10th Cir. 1968) (presentence reports).

On the other hand, the Office of Information Law and Policy of the Justice Department, which advises all federal agencies on compliance with FOIA, has concluded that all "nonrecord" materials (within the meaning of federal records programs) that may be readily identified and located within the time limits imposed by the FOIA are "agency records" under the FOIA. Subsection (c) of the FOIA provides that the Act "does not authorize the withholding of information or limit the availability of records to the public." The Senate Report stated that "[t]he purpose of the subsection is to make clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions * * *." FOIA Senate Report at 10 (1965) (emphasis in original). Accord, FOIA House Report at 11-12. This comment arguably explains Congress' apparent use of the words "information," "materials," and "documents" interchangeably with "records."

We need not address further which nonrecord materials are covered by the FOIA inasmuch as this question was not addressed below and, even if nonrecord materials are discoverable under the FOIA where they are in the possession of the agency, here the materials were not in the possession of the agency when the requests were made.

sponsibility to prepare memoranda on all "decisions, commitments, and discussions of any significance," 5 FAM 423.2-1, the notes were needed for making the required extracts, as the Legal Adviser concluded (A. 82a, 93a-94a). This process was not completed until Kissinger left office (A. 90a, 94a). Consequently, if the notes were nonrecord materials, they should have been maintained in working files of the agency throughout Kissinger's tenure as Secretary of State. And their removal without the substitution of adequate extracts would have been unauthorized.[39]

In summary, in the event the Court holds that an FOIA plaintiff may compel the return of "records" (within the meaning of the Federal Records Act), even though the request was made after the documents' departure from the agency, it should remand the case for further consideration of these questions.

III

THE STATE DEPARTMENT WAS NOT REQUIRED TO PRODUCE THE NOTES MADE WHILE KISSINGER WAS ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

If the Court agrees with the arguments we made in Part I of this brief (pages 26–38, *supra*), it follows directly that the judgment of the court of appeals must be

[39] This accords with the State Department's statement that "until such official material is extracted for the Department's records, the Department has a predominant interest in the paper that is otherwise personal" (A. 204a) (State Department Memoranda to the National Study Commission on Records and Documents of Federal Officials).

affirmed insofar as it is challenged by petitioners in No. 78-1217. The notes of Kissinger's conversations made at the White House while he was Assistant to the President for National Security Affairs were not in the custody of the Department of State at the time they were sought by the RCFP requesters. Indeed, they were never in the custody of any "agency" for purposes of the FOIA. The President and his personal staff are not an "agency,"[40] the Library of Congress is not an "agency," and the papers were not in the control of the State Department at any time. They were not generated in the State Department, they never entered the Department's files, and they were not used by the Department for any purpose. They were—so far as the Department of State was concerned—Kissinger's personal property,[41] and they were no more subject to the FOIA than were other materials Kissinger may have had in his office, materials such as personal books, diaries, papers indicating title to his car, drafts of personal speeches, and so on.[42]

[40] The FOIA applies to the "Executive Office of the President" (5 U.S.C. 552(e)). The "Executive Office" does not include the "Office of the President," which contains the President and his personal advisers. See S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15 (1974); H. R. Rep. No. 93-876, 93d Cong., 2d Sess. 20 (1974); cf. *Soucie* v. *David*, 448 F.2d 1067, 1074-1076 (D.C. Cir. (1971). The "Executive Office" contains entities such as the Council on Environmental Quality, the Council of Economic Advisers, and so on.

[41] Whether they were personal papers of Kissinger so far as the United States is concerned is another matter. It is possible that some of the notes may be covered by the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note. This possibility, however, is not material to the disposition of this case.

[42] This point disposes of the arguments of Safire, who requested some of the notes while they were in the State Depart-

But even if the Court disagrees with us and holds that the notes made while Kissinger was Secretary of State are "agency records" that were "withheld," the Court should reject the arguments of petitioners in No. 78-1217 concerning the notes made by Kissinger at the White House. First, the FOIA is designed to permit inquiry into how an agency performs its official duties, not to force agencies to serve as a research arm of the requester or a lending library. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Lybarger* v. *Cardwell*, 577 F.2d 764, 766-777 (1st Cir. 1978). A document that simply passes through an agency, a document created elsewhere and not reflecting on the agency's performance, is not an "agency record."[43] Consequently, even if Kissinger's notes as Assistant to the President had found their way to the State Department's files, and even if a request for them had been made while the notes were at the State Department, they would not have been subject to production. But this is not what happened. The NSC notes never entered the Department's files. Instead, Kissinger simply kept them in his office rather than elsewhere. Even if the notes he generated as Secretary are "agency records" of the State Department, Kissinger's notes from his prior employment were more State Department records than was his personal library.

Second, petitioners' position is not improved by their claim that some of the notes were records of the National Security Council. Petitioners apparently concede (78-1217 Pet. 6-7) that they are not entitled to any notes that pertain to Kissinger's activities other than his role with respect to the National Security Council. They maintain, however, that the NSC is an "agency" for purposes of the FOIA and that they are therefore entitled to the notes that "relate to the affairs of the NSC (Pet. 11). Notes that simply "relate" to the affairs of the NSC, however, are not NSC records. Kissinger was the President's personal adviser, not an employee of the NSC. Kissinger was assisted by the NSC staff in providing advice to the President but did not serve at the pleasure of the NSC. Kissinger's notes that happened to pertain to NSC matters were no more records of the NSC than his notes that happened to "relate to" farm matters were records of the Department of Agriculture.

The greatest stumbling block for the RCFP requesters, however, is that they never sought the documents from the NSC itself. Where, as here, neither the NSC nor the State Department had custody of the records at the time the request was filed, surely the requesters should have made their request of the NSC (whose "records" the notes allegedly were) rather than of the State Department, which was essentially a stranger to them. There will be time enough to consider whether one agency must disclose under the FOIA documents created by another agency when a request for disclosure is presented to an agency that possesses the documents.[44]

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ment's building but not in the Department's custody and control.

[43] Cf. *Warth* v. *Department of Justice*, 595 F.2d 521 (9th Cir. 1979); *Goland* v. *CIA*, No. 76-1800 (D.C. Cir. May 23, 1978), petition for cert. pending, No. 78-1924; *Cook* v. *Willingham*, 400 F.2d 885 (10th Cir. 1968).

[44] Safire's FOIA request for the notes was presented while they were located in the State Department building, and this aspect of our argument does not apply to his request. His request nonetheless is defeated by the other contentions we have

IV

INSPECTION AND PROCESSING OF THE NOTES FOR RELEASE UNDER THE FOIA WOULD NOT VIOLATE KISSINGER'S CONSTITUTIONAL PRIVACY INTERESTS

If the Court agrees with our submission that there is no warrant for ordering the Library of Congress to return the notes to the Department of State, it will be unnecessary to consider Kissinger's contention that any processing of the notes for possible release under the FOIA would violate his constitutional right of privacy. If the Court disagrees with our principal submission, however, and orders the notes transferred to the State Department, then it should reject Kissinger's argument in this regard.

Kissinger's contention is foreclosed by *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455–465 (1977). The Court held in *Nixon* that the transcription of tapes made in the Oval Office, the processing of those transcripts for possible release, and the thorough review of all written materials concerned with public business did not violate President Nixon's constitutional interests. The processing of Kissinger's notes is no more offensive than the processing of Nixon's material. Like Nixon's tapes and papers, Kissinger's notes were made by public employees on government time; the

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made, including the fact that the State Department never had custody of the notes. It is important to recognize, moreover, that Safire waited more than a year after his FOIA request was denied before he brought suit. During the year the notes were transferred to the Library of Congress. In determining whether to grant the extraordinary relief of requiring a non-agency to deliver the notes to an agency, the district court, exercising its equity powers, should have taken this delay into account.

conversations predominantly concerned official business; and any admixture of private materials with the public business is attributable to Kissinger's instruction that notes be made indiscriminately. The commingling of public and private affairs was Kissinger's choice.

A holding by this Court that the notes must be transferred to the State Department necessarily would rest on a conclusion that the Department not only has a right of access to the portions of the notes that deal with public business but also never should have let the notes leave the building. Such a holding necessarily defeats Kissinger's claim of privacy. The Department's rights in public papers cannot be defeated by Kissinger's decision to mix private affairs in with public business and to order notes to be taken indiscriminately. See also *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), which holds that when public and private matters are mingled in a document, both administrative officials and courts may screen the document to separate the public from the private and to release the public materials.

Indeed, Kissinger's arguments are significantly weaker that Nixon's. Many of the tapes involved in *Nixon* had not been transcribed or heard by anyone, and Nixon contended that he made the tapes only on the assumption that he would be the only person ever to hear them. Here, by contrast, all of the notes were made by Kissinger's secretary, not by machine. The notes were circulated to Kissinger's staff; all of them thus were seen by many eyes. And when the notes were donated to the Library of Congress they were fully reviewed, and extracts were made. None of the screening that the district court's order requires would invade Kissinger's privacy to a greater extent than the

invasion that already has taken place for the purpose of making the extracts.

CONCLUSION

To the extent the judgment of the court of appeals denies the relief sought by the plaintiffs, it should be affirmed. To the extent the judgment requires some of the notes to be transferred from the Library of Congress to the Department of State, it should be reversed. The case should be remanded with instructions to dismiss the complaints.

Respectfully submitted.

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